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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 972 65

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

WOKO, INCORPORATED.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

## BRIEF FOR THE RESPONDENT IN OPPOSITION.

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## INDEX.


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Question Presented | 4 |
| Commission's Specification of Alleged Errors | 4 |
| Reasons for Denying Writ | 9 |
| Conclusion | 16 |


## CITATIONS.

CASES:


| | |
|---|---|
| Cannon System, Ltd., (KIEV), 8 F. C. C. 207 | 12 |
| East Texas Broadcasting Co. (KGKB), 8 F. C. C. 479 | 12 |
| Federal Radio Commission v. Nelson Bros. Bond & Mtge. Co., 289 U. S. 266 | 6, 14 |
| Georgia School of Technology (WGST), 10 F. C. C. —March 23, 1943 | 12, 16 |
| In re Application of Buffalo Broadcasting Corp., 10 F. C. C.—December 19, 1945 | 9, 14, 16 |
| Lee E. Mudgett (KRKO), 8 F. C. C. 226 | 12 |
| N. L. R. B. v. Columbian E. & S. Co., 306 U. S. 292 | 14 |
| Navarro Broadcasting Association (KAND), 8 F. C. C. 198 | 12 |
| Ocala Broadcasting Co. (WTMC), 9 F. C. C. 223 | 12 |
| Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208 | 12 |
| Red Lands Broadcasting Association, et al, 8 F. C. C. 473 | 12 |
| Saginaw Broadcasting Co. v. Federal Communications Commission, 68 App. D. C. 282, 96 F. (2d) 554 | 6 |
| S. E. C. v. Chenery Corp., 318 U. S. 80 | 6 |


STATUTES:


| | |
|---|---|
| Communications Act of 1934, 48 Stat. 1064, 50 Stat. 189 47 U. S. C. § 151, *et seq.*: | |
| Sec. 402(b) | 6 |
| Sec. 402(c) | 6, 14 |
| Sec. 501 | 9 |
| Sec. 502 | 9 |

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## BRIEF FOR THE RESPONDENT IN OPPOSITION.

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### Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 80-94) has not been reported.*

* The decision of the Federal Communications Commission (R. 30-51), reversed by the court below, has not been reported.

## Jurisdiction.

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 94). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

## Statement.

Respondent does not dispute any of the findings of fact made by the Commission in its decision which is the subject of this litigation (R. 30-47). However, it is respondent's belief that the telescoped "Statement" in the Commission's petition overlooks many facts essential to a proper understanding of the background of this case. Accordingly, respondent adopts as its own for the purposes of this brief, the findings of fact (R. 30-47) made and entered by the Commission as a basis for denying respondent's application for renewal of license, and for an accurate summary of those findings respectfully refers this Court to the statement of the facts in this case found in the opinion of the Court below (R. 80-85).

From an order of the Commission denying respondent's application for renewal of license and a later petition for rehearing, respondent took an appeal to the United States Court of Appeals for the District of Columbia. On January 21, 1946, the Court of Appeals reversed the Commission's order. In its opinion, the Court said:

> "Simply stated, the question in this case is whether it is logical and rational to say that a licensee cannot be entrusted with further responsibilities for the sole reason that, over a term of years, one of its officers has concealed from the Commission the identity of a beneficial owner of twenty-four percent of its capital stock" (R. 92).

In approaching its decision of this question, the Court pointed out:

" . . . the Commission's decision must depend for validity on the rationality of the step, directly and without any other consideration, from the Commission's well grounded finding that the real beneficial owner of twenty-four percent of the stock had been concealed from it; to the conclusion that the appellant (respondent herein) 'cannot be entrusted with the responsibilities of a licensee', and the consequent additional conclusion that the renewal license would not serve the public interest, convenience, or necessity." (R. 92).

The answer which the court below gave to the question involved in the case is found in the concluding paragraphs of the Court's opinion:

"We are unable to agree that the step can logically be taken. Other elements must necessarily be weighed. Certainly the conclusion cannot be upheld as a penalty, for the reason stated heretofore; but the conclusion that the denial of the renewal license was penal in nature and so intended by the Commission cannot be escaped, for the appellant is the same corporation now which for fifteen years consistently has furnished adequate and satisfactory broadcasting service to its public, and has in all respects met the requirements of law and regulation except in the concealment of stock ownership upon which the Commission based its action. The Commission was quite justified in feeling vexed at the deception, and perhaps would have been justified in seeking criminal prosecution of Smith or of the appellant itself; but to say that this concealment, which did not induce or influence its former grants of renewal licenses, alone supports a conclusion that public interest, convenience, or necessity would not be served by the renewal, is in logic a non sequitur. The high mechanical, scientific and artistic standards maintained by the station, and the highly penal result of the deprivation of a license for a continuance of operation, are necessary considerations in the formation of a judgment as to public interest, convenience, or necessity.

"Under the situation disclosed here, we conclude that the Commission acted arbitrarily in proceeding from

its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established and satisfactory radio station and of imposing upon its corporate owner the entire loss of its good will and the serious impairment of the value of its capital assets." (R. 92-93.).

## Question Presented.

The simple question thus presented by the Commission's Petition for Writ of Certiorari as shown by the decision of the court below is whether the Commission's finding that respondent was chargeable with a misrepresentation as to the beneficial ownership of a minority interest in its stock, standing alone, supported the Commission's conclusion that respondent lacked the character essential to continue to be a licensee of a radio broadcasting station.

The Commission's position is that such a finding automatically required the conclusion that respondent lacked the character essential to continue to be a licensee. The Court held that the jump from the bare finding of misrepresentation to the ultimate conclusion of lack of character was, in the circumstances of this case, so unreasonable as to constitute arbitrary action and not the exercise of a sound administrative judgment.

## Commission's Specification of Alleged Errors.

The Commission's allegations as to errors committed by the court below stem from an erroneous interpretation of the opinion and judgment of that court. We will briefly deal with each of the alleged errors.

1. The court below did not hold that the Commission lacks authority under the Communications Act of 1934[1] to deny an application for a renewal of license on the ground that an applicant had deliberately made false state-

[1] 48 Stat. 1064, 50 Stat. 189, 47 U. S. C. § 151, *et seq.*

ments which demonstrated his lack of qualifications to be a licensee of a broadcasting station. It would appear from the Commission's first specification of error that the court below held that a finding that deliberate misrepresentations had been made by a licensee was immaterial to the consideration of the licensee's qualifications for renewal of license, and that all such misrepresentations must be condoned by the Commission. The Commission concedes that the crucial issue before it on respondent's renewal application was the character of respondent to continue as a licensee of a broadcasting station. What the court held was that, in order to conclude that a licensee who had made misrepresentations to the Commission is for that reason lacking the requisite character to be a licensee, there must be some logical nexus between the misrepresentations made to the Commission and the conclusion that the licensee lacks the character essential to continue to operate a broadcasting station. The materiality of the facts concealed or misrepresented, the motive and purpose in making the concealment or misrepresentation, the extent of reliance by the Commission upon the misrepresentation, the type of service, both technical and program, likely to be rendered by a person found to have made the particular misrepresentation, and the inferences to be drawn as to the character of the applicant from his past record of performance as a licensee of a broadcasting station, these and other similar considerations were held by the Court to require the attention of the Commission in determining what conclusions should be drawn from the fact that a licensee has been found to have made a misrepresentation to the Commission. It is not a fair interpretation of the decision of the court below to contend that it holds that the Commission does not have authority under the Communications Act of 1934 to deny an application where the false statements made to the Commission can reasonably and logically be held in and of themselves to demonstrate lack of character of the applicant to operate a radio broadcasting station.

2. The second specification of error in the Commission's petition stems from an erroneous conception of the proper function of the court below in reviewing appeals taken under Section 402(b) of the Communications Act. There is no question but that the court below in reversing the Commission necessarily exercised its own judgment and discretion on the questions of law involved in the appeal. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94. How else could the court have exercised its judicial power under Section 402(e) of the Communications Act of 1934? The court below did not substitute any of its own findings of fact for those made by the Commission, but held that the Commission's own findings did not support the Commission's conclusion. In deciding whether the findings of fact made and entered by the Commission supported the conclusion that respondent was not qualified to continue to be a licensee of a radio broadcasting station, the court below was performing a proper judicial function and was not usurping any administrative function exclusively vested in the Commission. It is well settled that the determination by the court below under Section 402(e) of the sufficiency of Commission findings to support its conclusions involves the exercise of a judicial function. *Federal Radio Comm.* v. *Nelson Bros. Bond & Mtge. Co.*, 289 U. S. 266; *Saginaw Broadcasting Co.* v. *F. C. C.*, 68 App. D. C. 282, 96 F (2d) 554. Cert. denied 305 U. S. 613.

3. The Commission's third alleged error that the court rested its decision upon its own findings on issues on which the Commission made no findings and found it unnecessary to make any, again proceeds from an erroneous interpretation of the court's decision.* It is quite clear from the court's opinion that its judgment was rested upon the insufficiency of the Commission's findings to support the Commission's conclusion. The portions of the court's de-

* The Commission ignored these issues; it did not, as implied in the third specification, find it "unnecessary" to make findings on the point.

cision which deal with matters on which the Commission made no findings merely emphasizes the failure of the Commission itself to consider factors which were relevant to its conclusion in this case. The failure by the Commission to make any findings on issues which were essential to support its conclusion in this case, coupled with an administrative record which would only support findings favorable to respondent on such issues, accentuates the arbitrary character of the conclusion reached by the Commission and fully justified the court below in reversing the Commission.

4. With respect to the contention that the court below made certain findings, which the Commission was unable to make on the administrative record, with reference to the innocence of Curtis and The Press Company (two of the four stockholders of respondent corporation holding between them 50½% of respondent's stock) concerning Smith's concealment of Pickard's stock ownership, it is sufficient to quote from the opinion of the court below:

> "*There is no finding that Curtis,* who owned twenty-five and one-half percent of the appellant's capital stock, and The Press Company, which owned twenty-five percent of the appellant's capital stock, had any part in, or knowledge of, Smith's concealment of the Pickard interest. *It does appear that Curtis and The Press Company* knew of the original issue of two hundred forty shares to Pickard or his nominee, but *there is no suggestion that either participated in or knew of Smith's deception.*" (Italics supplied) (R. 84).

Again, the court below did not substitute its findings for those of the Commission. The court was merely adverting to the absence of findings by the Commission on the issue of *scienter* and, indeed, in its petition for writ of certiorari the Commission does not even suggest that the administrative record would support a finding of guilty knowledge on the part of Curtis or The Press Company of the misrepresentations made to the Commission.

5. The court did not hold, as the Commission implies, that the value of property used in a station's operation must be

taken into consideration in determining the qualifications of a licensee to obtain a renewal of license. What the court said on this point is as follows:

> "Moreover, common justice to the owner of the station, who has devoted a considerable investment to serving the public, requires that for no reason less than a 'compelling' one should his physical property be rendered valueless except for what it may bring at a sacrificial sale. It is true, as the appellee points out, that by the terms of the Communications Act, a station license does not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof, nor in any other manner than authorized therein. In spite of the absence of a vested property right in the continuance of the license, however, the Commission may not destroy or diminish the capital investment of the licensee by withholding a renewal of the license, unless in the exercise of a sound discretion it decides that the public interest, convenience, or necessity requires that such a drastic step be taken. The case of *Journal* v. *Federal Radio Commission*, 60 App. D. C. 92, was one in which a radio station had been effected injuriously by the assignment of its frequencies to another station. In the course of the opinion Judge Robb, speaking for this court, said:
>
> > 'The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interest of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons.'
>
> If a station should not be injuriously affected save for compelling reasons, certainly it should not be destroyed by a refusal to renew its license for reasons that are less than compelling." (R. 91).*

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*To the same effect is the following language of the Commission in a decision rendered by it only a few weeks before the decision of the court below:

> "The failure of the Buffalo Broadcasting Corporation to make full disclosure in its report to the Commission of its

6. In alleging as error the holding by the court below that the Commission is precluded from denying a renewal of license because of false statements made by the applicant, since Sections 501 and 502 of the Communications Act provide penalties, the Commission again imports to the decision of the court below an interpretation which a fair reading of the decision does not justify. The court adverted to the provisions of Sections 501 and 502 of the Act as providing a procedure for invoking punitive measures against persons making false statements in applications or reports to the Commission, but nowhere in its opinion did the court intimate that the Commission was precluded from considering conduct punishable by fine or imprisonment as having a bearing upon the qualifications of respondent to continue as a licensee of a radio broadcasting station.

**Reasons for Denying Writ.**

1. The decision of the court below does not impose a limitation on the Commission's licensing authority. The decision recognizes the Commission's power and duty to determine the qualifications of all applicants for licenses or renewal of licenses including the character of an applicant to become or continue to remain a licensee. In the instant case

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agreements with the Churchill Tabernacle indicates a lack of candor and care in the preparation of the reports. While this has a direct bearing in the applicant's qualifications, we do not conclude that in this case the omissions were so serious—particularly in view of the fact that one of the basic agreements was before the Federal Radio Commission—as to require the applicant to be deprived of the value of the stations which it has successfully operated for more than fifteen years. Nor, do we conclude that for this reason the applicant should be found disqualified to ever again operate a radio station." *In re Application of Buffalo Broadcasting Corporation*, 10 F. C. C. —, December 19, 1945.

In this case the Commission found that the licensee had divested itself of control over the programs of its station (a violation of law), and had made misrepresentations concerning that fact to the Commission.

the Commission concluded that respondent lacked the character essential to continue as a licensee of a radio broadcasting station. In holding that this conclusion as to respondent could not logically or reasonably be drawn from the facts found by the Commission and set forth as the basis for its conclusion, the court below did not in any way curtail or hamper the Commission in the lawful exercise of any of its statutory functions. In reversing the Commission, the court did not deny the existence of the Commission's authority as a licensing body to determine the character of respondent to continue as a licensee; on the contrary, the court's decision recognizes this authority in the Commission and simply holds that it must be lawfully and properly exercised.

The court below did not hold, as the Commission asserts, (Br. 9-10) that a properly grounded conclusion of lack of character in respondent would have to outweigh any other competing considerations, before the Commission could properly refuse to renew respondent's license. It is plain from the decision of the court below that if the Commission's findings had rationally supported its conclusion that respondent lacked character to be a licensee, the Commission's decision would have been affirmed. The court held that, in this particular case, other considerations besides the misrepresentation with which respondent had been charged should have been considered as bearing upon respondent's character to be a licensee. This is not the same as holding that in determining the ultimate question of respondent's qualifications it was necessary for the Commission to go beyond a proper conclusion as to the lack of any requisite qualification. There is no question but that if the Commission had properly concluded that respondent was lacking in one requisite qualification, whether that was a legal, financial or technical qualification, or absence of character to be a licensee, it would have been unnecessary for the Commission to balance the lack of one qualification against other qualifications that respondent might have possessed

in order to determine whether its license should be renewed. The court's reference to respondent's past record as a licensee was made as indicating that this had some bearing on the issue of respondent's character to continue to be a licensee. Findings as to respondent's past program and technical service conceivably might have lent support to the Commission's conclusion that respondent could no longer be entrusted with the responsibilities of a licensee. Conceivably they might have supported a contrary conclusion. In any event, respondent's record of performance as a licensee over a period of some fifteen years was considered by the court below as having some bearing on the question of respondent's character to continue to remain a licensee, and in failing to advert to respondent's past performance as a licensee, the Commission necessarily omitted one relevant factor in reaching its conclusion. Since the question before the Commission in the instant proceeding was the character of respondent to carry out the duties and responsibilities of a licensee, certainly the past record of the respondent in carrying out such duties and responsibilities had some relevance to the conclusion as to whether respondent did or did not possess the requisite character.

2. The argument which the Commission makes that the decision of the court below imposes a heavy administrative burden upon the Commission to investigate the accuracy of representations contained in each of the thousands of applications received annually would have merit only if the Communications Act of 1934 contained an absolute bar upon the granting of licenses or renewal of licenses to persons who make false statements to the Commission. The assertion that an intolerable burden is imposed upon the Commission as a result of the decision of the court below which will seriously impede, if not prevent, the normal operation of the Commission cannot be taken seriously in view of the Commission's assertion that the determination of the effect of a finding of misrepresentation must be made by the exercise of a sound discretion by the Commission. If the Com-

mission must exercise a sound discretion in each case where it discovers that a misrepresentation has been made to it, then it cannot apply any such "rule of thumb" method as it applied in the instant case. It would have to determine in the case of each misrepresentation the motive, purpose and surrounding circumstances, and the bearing which the misrepresentation has on the character of the applicant to be a licensee. In order for the Commission's administrative burden in this respect to be diminished, it would be necessary for the Commission to disqualify any person which it found to have made a misrepresentation irrespective of the circumstances or extenuating factors that might be present. To take such a position is to argue for an interpretation of the statute which places a far greater limitation on the Commission's licensing authority than does the decision of the court below.

The court held that the Commission has discretion (in fact the responsibility) to determine in every case what inferences should be drawn from the misrepresentations in deciding the character of the applicant as a prospective licensee. During the entire history of the Commission and its predecessor, the Federal Radio Commission, the interpretation of the Commission's powers with respect to the renewal of licenses of stations to persons who have made misrepresentations to the Commission has been uniformly the interpretation which the court below gave in the instant case.* In the Commission's petition for writ of certiorari we are confronted with the incongruous spectacle of a licensing agency suggesting an interpretation of the statute under which it operates, which places the agency in a straight jacket and deprives it of any authority

*Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208 (1942); Ocala Broadcasting Co. (WTMC), 9 F. C. C. 223 (1942); Red Lands Broadcasting Ass'n. et al., 8 F. C. C. 473 (1941); East Texas Broadcasting Co. (KGKB), 8 F. C. C. 479 (1941); Lee E. Mudgett (KRKO), 8 F. C. C. 226 (1940); Cannon System, Ltd. (KIEV), 8 F. C. C. 207 (1940); Navarro Broadcasting Ass'n. (KAND), 8 F. C. C. 198 (1940); Georgia School of Technology (WGST), 10 F. C. C. ——, March 23, 1943.

to exercise discretion in determining the seriousness of a misrepresentation, its bearing upon the ability of a licensee to render a public service, or its relationship to the character of a person to become or to continue to be a licensee. The Commission has always in the past asserted the power to weigh the misrepresentation against other relevant factors in determining whether or not a license should be granted or renewed. Some of the decisions in which the Commission has exercised its discretion as a licensing body and has renewed licenses despite the finding of prior misrepresentations to the Commission are cited in the decision of the court below. Respondent is not contending that the Commission is bound by these decisions on the doctrine of *stare decisis*, but rather that the uniform interpretation heretofore given the statute by the Commission over many years and accepted and followed by the court below is a proper interpretation of the Communications Act of 1934, and that any interpretation of the Act which would lighten the Commission's administrative burden by requiring a denial of license to a person found to have made misrepresentations to the Commission is not only in conflict with the Commission's own interpretation of the statute, but one which cannot be supported by logic nor necessity.

3. The Commission also urges as a reason for granting the writ that the court overstepped the boundary between judicial and administrative functions and substituted its own judgment for that of the Commission on a matter entrusted to the discretion of the Commission by the Communications Act. This argument is valid only on the assumption that the court below has not power to review the Commission's actions on matters of law. The court below held that the conclusion that respondent lacked the necessary character to be a radio station licensee did not follow automatically from the finding that respondent had made a misrepresentation to the Commission. The sufficiency of the Commission's findings to support its conclusion is a matter within the proper judicial power of the court below

to determine under Section 402(e) of the Act. *Federal Radio Commission* v. *Nelson Bros. Bond and Mtge. Co., supra; National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292, 301.

4. As pointed out above, the court did not hold that the value of the property which would be deteriorated in value by a refusal to renew the license was a factor which the Commission had to consider as bearing upon the qualifications of the licensee. The court did point out that the large investment which the station licensee has in physical property is a reason why the Commission should not arbitrarily take action which would result in the utter destruction or severe deterioration of substantial property values. No suggestion was made by the court below that respondent had any property right in its license. See the language of the Commission in ~~his~~ *Buffalo Broadcasting Corp. Case*, see p. 8, footnote, *supra*.

5. The remaining reasons alleged by the Commission for granting the writ are equally without merit. There is no contention in this case that the refusal to grant a license is penal in nature *because* it necessarily results in damage to the applicant. The Commission itself disclaims any right to exercise its licensing power to punish a licensee for any past wrong doing. In substance and effect, however, action by the Commission which denies renewal of license on the grounds of a past wrongdoing, without tying in such wrongdoing with the inability of the licensee to continue to operate a radio broadcasting station, constitutes punishment rather than the exercise of a licensing power.

There need be no fear that the decision of the court below will have any adverse effect upon the licensing powers of federal agencies in general. Other agencies, we are sure, are aware that their conclusions of law must be supported by adequate findings of fact, and that is all the decision of the court below holds. With respect to the importance of being able to rely upon the correctness and

completeness of the information furnished by applicants and licensees, other agencies, like the Communications Commission, have for many decades faced this problem. It is true that the Commission has the burden of acting upon thousands of applications of licenses and renewal of licenses, and it is also true that the Commission must of necessity rely upon statements made in these applications in acting upon them. Similarly, other agencies of the Federal government must rely upon the truthfulness of statements made in applications and reports filed with them. Congress has provided severe penalties to deter persons from making false statements in such applications. Congress has not made misrepresentations an absolute bar to the granting of licenses or the renewal of licenses by the Communications Commission nor, for that matter, of licenses issued by any other Federal agency. Indeed, any such standard would constitute an unrealistic and unwise innovation.

If there is an inevitable connection between making false statements to the Commission and a disability to operate a radio station in the public interest, it lies with Congress to so specify, it certainly is not within the province of the Commission to add new qualifications to those laid down by Congress or to ask this Court to do so. The court below pointed out that drastic sanctions have been applied by Congress to the making of such false representations to the Commission. It hardly seems appropriate for the Commission to complain about a decision of the court below which adopts an interpretation of the statute which the Commission itself has uniformly held for years—nor can it either consistently or logically argue that the decision now interferes with the proper exercise by the Commission of its licensing functions.

The decision below involves no usurpation by the court of the Commission's functions. It does not circumscribe the Commission's discretion in acting upon applications for renewal of license; on the contrary it upholds the Commis-

sion's power to exercise a sound administrative discretion in acting upon such applications. The decision below does not announce a new or novel interpretation of the Communications Act. The decision gives the statute a sound and sensible interpretation consistent with the Commission's own interpretation of the statute not only prior to its action on respondent's renewal application, but in cases decided by the Commission subsequent thereto. *Georgia School of Technology (WGST)*, 10 F.C.C.—March 23, 1943; *In re Application of Buffalo Broadcasting Corporation (WKBW and WGR)*, 10 F. C. C.—December 19, 1945. The court's decision does not preclude the Commission from exercising a sound administrative discretion in determining the character of an applicant for license or renewal of license of a broadcasting station. It lays down no new or novel standard for determining whether a conclusion of law reached by the Commission is arbitrary. The decision of the court makes it clear that this case involves only the simple question of whether an ultimate conclusion reached by an administrative agency must be adequately supported by its basic findings of fact. In deciding that the Commission's conclusion in the instant case was not so supported and, therefore, was arbitrary and capricious, the court below did not render a decision of such importance or far-reaching effect as to require or justify the issuance of a writ of certiorari.

## Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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